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NATIVE SELF-DETERMINATION THROUGH BAND COUNCIL

AN OVERVIEW

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Recent years have witnessed a surge of interest by natives in the assertion of their identity and their culture. The necessity of self-government, although apparent, was not crucial to most of the natives prior to the 1960's. The advent of mass pipelines and hydro projects destroying the environment and consequently the livelihood and lifestyle of many Indians have been a rude awakening for these people. The federal government in 1969 announced its policy to abolish the 'special status' which Indians had enjoyed prior to such time. Indeed isolationist reserve system had to a certain extent allowed the Indians under it to remain relatively free from outside influence, at least in a time when the economics of native society did not dictate an interference with reserve lands. The Indians, especially those regulated by the Indian Act, having much to lose by the government's policy, objected to it in the most vehement manner. It might be said that the need for a government based on the principle of self-determination became crucial as a result of the impending intrusion of non-native forces and enunciated policy of withdrawing not only special status but also a massive bureaucracy on which many natives had become largely dependent. Whatever the reasons, the needs, recognized by the Indians

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is represently advanced by the N.I.B. through a revision of the Indian Act. The primary purpose of this essay is to assess the present Indian Act, and the legal system in general, in terms of their conduciveness to any given band's self-determination through its self-government. It is the writer's hope that in making his assessment, possible pitfalls in future legislation may be avoided. The approach is to firstly point out the more obvious and secondly the more inherent, though less noticeable, impediments to a band's exercise of self-determination through that form of self-government allowed under the present Indian Act.

The essay begins with the description of the present form or structure of self-government under the Indian Act, the appropriateness of that structure and the effect of its being imposed. An examination of band council's primary jurisdiction over the regulation of its society as well as the possible erosion of that jurisdiction will follow. The scope of band by-laws in terms of territory and persons and the effect of such scope are then considered. Since a legislative jurisdiction is of little value without the possibility of enforcing the laws made under it, the realistic enforcement of band by-laws is also discussed. The power or access to monetary funds and the control over the use of reserve lands for

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community projects, being necessary to the proper exercise of a band's right to self-determination is then sketched in terms of band council's present role in relation thereto. Finally, the writer finds it necessary to deal with the legal status of a band as status could not only affect the band's standing in a court of law but also its capacity to engage in other activities. The second portion of the essay discusses the more subtle aspect of a band's self-determination. The general ambiance and the legal significance of the statutory and administrative process through which a band council's proposal must pass is examined in terms of its conduciveness to self-determination.

It is submitted that since, for the purpose of self-determination, the optimum structure of a self-government is that which lends itself and is most appropriate to the culture of a people, the ability to chose such a structure is not only concudive but is necessary to the self-determination of that same people. Yet, the Indian Act imposes upon the bands the structure of their "self"-government.

As a general rule the governing body is a Council composed of one chief and at least two but no more than six councillors, duely elected by popular vote for a period of no more than two years.[1] The Act sets out

the eligibility requirements as well as Cabinet's regulatory jurisdiction over the elections.[2] It appears that the sole input accorded to the natives is the right to delimit the number and areas of electoral districts.[3] This can hardly be a useful tool since the designation of such areas is subject to the Minister's approval and limited in number by the Act.[4] Given the denial of an opportunity to decide the structure of its self-government, can it be said that the imposed structure is, nevertheless, conducive to self-determination?

The band council, as constituted under the Indian Act, is a product of that democratic philosophy which has been applied to non-native municipal, provincial and national levels of government in Canada - viz. a legislative assembly periodically elected by the majority of voting constituents. It may be argued that since this structure of government has been conducive to the self-determination of the non-native segment of Canadian society, a point in itself debatable, it should be equally so conducive to native Canadians. This argument, however, undermines the essence of a governmental structure since it is not conducive to self-determination unless it is an expression of and appropriate to the culture of the people governed. It could have been of little surprise when members of the Six Nations Band

refused to acknowledge a decision made by the elected council with respect to the alienation of a part of the reserve lands.[5] Indeed, a good majority of the members never voted or in any other way participated in that government although they maintained their traditional form of self-government through a system of hereditary chiefs chosen by the clan mothers. Implicit in this choice of government are the defined roles in their society. The court could not but fail to recognize the traditional government which might well have been capable of carrying out the functions assigned to a band council under the Indian Act. It became apparent that the expression and perpetration of cultural values would not be permitted through the form of the Indians' "self"-government. Altogether aside from the expression of cultural values, can it be said that the elected council is the most appropriate form of self-government for every band? Bands being very often much smaller in the number of constitutents then most non-native agglomerations, a greater degree of decentralization than that permitted by the present system may be preferrable. A member of the Dene nation, much involved in the politics of the North-west Territories, has indicated his belief that the elected council leads to an elitism whereby decisions are at best made for the people and not by the people.[6]

To the extent that an alternate form of government envisaged by a band is more feasible one wonders at the benefit which its members derive from having to govern themselves by a system created by and for a people living in an entirely different demographic let alone cultural context.

The analysis of band council's jurisdiction begins with an examination of section 81 to 86 for, although it is admitted that its powers are somewhat dispersed throughout the Act, it seems clear that the bulk of its legislative authority lies within these sections.

The subject-matters listed in section 81, being very similar to those areas delegated to a municipality by a province, are conducive to self-determination. For instance, the jurisdiction to provide for the health of residents and to prevent the spread of contagious diseases, on its face, entitles a band council to set its own health standards and to establish programs for the maintenance thereof.[7] More notable is council's power to restrict the uses to which land may be put,[8] "to establish building standards,[9] to regulate traffic[10] and to pass by-laws for the construction and maintenance of public works such as water supplies, bridges, roads and fences.[11] Unlike municipal councils, a "band"

council has, upon request to and grant by the Governor in Council,[12] the general authority to allott reserve lands thereby increasing its capability to regulate the social, economic, and physical layout of an area in which the community lives. Add to this the council's authority to prevent disorderly conduct and nuisances[13] and to control or prohibit public games, sports, athletic events and other amusements[14] and the result is the availability to the band members of regulating many facets of communal living so long as the power is exercised through their council. Finally, the authority to pass by-laws for the "observance of law and order" strengthens the band's potential for self-determination even though the limits to such authority are recognized.[15] It is submitted that by setting out the maximum penalty for the breach of any band by-law and by including the authority in a list of powers similar to those given to municipalities, sound principles of statutory interpretation do not permit the establishement of a judicial system but rather limit the jurisdiction in question to the enforcement of by-laws and perhaps even other laws, to something similar to a police force or some other form of a prefect system which would bring the person in breach of a law to a court of competent jurisdiction.

Central to a way of life is the maintenance of an

environment which will sustain it. For those bands choosing to hunt, trap and fish for their cultural survival, recourse may be had to council's jurisdiction over the "preservation, protection and management of fur-bearing animals, fish and other game on the reserve."[16] It is important to note, that this leaves band council with the discretion as to a proper method of protection and preservation of those natural resources, a discretion which could easily be exercised on cultural, ie. religious beliefs. Finally, band council is given a substantial tool with which it can define the band's social and cultural boundaries through by-laws relating to trespassers and to off-reserve persons seeking to enter into commercial transactions on the reserve.[17] Though the power over such merchants is regulatory and not prohibitive band council may nevertheless prevent persons of unsavory character from carrying on business in the community by passing a licensing by-law making good character a precondition to the issuance of a license.

It is necessary to point out, at this juncture, that many matters affecting the culture of a people are not within the legislative jurisdiction of the band council. The Indian Act provides for the education of children, the devolution of estates and the making of wills as well as for a complex system of landholdings.

The band's jurisdiction fails to reach the defining of family relationships such as marriage, adoption and divorce. Nor does it extend to the creation of a "judicial system for the enforcement of societal values.

Despite the lack of jurisdiction over these relatively important areas one would nevertheless appreciate the wide scope of social regulation open to a band council under section 81. Unfortunately, the opening words of that section seem somewhat suspect. "The council of a band may make by-laws not inconsistent with this Act or with any regulation or order made by the Governor-in-Council or the Minister ...". To what extent can the by-laws of a band council be so inconsistent? Upon a reading of the Indian Act, section 73, which grants regulatory jurisdiction to the Governor-in-Council, immediately presents itself as the nemesis of the band's right to self-determination.

Attention is first drawn to subsection three of section 73: "The Governor-in-Council may make orders and regulations to carry out the purposes and provisions of this Act." It is noted that to make regulations for the purposes of the Act, that is independently of the Act's provisions, is a delegation of legislative powers. Although such delegation is within Parliament's jurisdiction it is doubtful that the Cabinet could regulate in

a manner contrary to the express provisions of the Act and it is submitted that such regulations would be subject to judicial review as to whether they are in fact for the purposes of the Act.

Apart from the general basket provision in sub-section three, section 73 does list a number of specific heads. The exercise of which may greatly diminish band council's jurisdiction. Any by-law passed for the health of residents is affected by Cabinet's regulations controlling the spread of diseases or providing for medical treatment, health services and compulsory hospitalization of Indians infected by diseases.[18] Further Cabinet may set standards for sanitary conditions in both public and private place.[19] The Minister, empowered to authorize the use of lands in a reserve for the purpose of, inter alia, health projects, may establish such a project in a location undesireable to band council since the wording of the Act is unclear as to whom the Minister may authorize.[20]

A band council may find one of its building by-laws disregarded when, as a result of a regulation, premises are being destroyed, altered or renovated.[21] Its power in reference to putting up fences is subjected to the extent of Cabinet's regulations over boundary fences.[22] There can be no doubt that decisions as to the location of bridges and roads affect the environment

within which a culture attempts to survive yet the act specifically gives such decision-making to the Minister along with the capacity to order the construction of this type of public work.[23] The band is then under a statutory duty to maintain the road in accordance with the instructions of a superintendent and where, in the opinion of the Minister, the band is in breach of its obligation the work is to be done at the expense of the band.[24] Further, the control of the speed, operation and parking of vehicles on these band roads leaves the jurisdiction of council upon the exercise of Cabinet's regulatory power.

Land holding or at least land occupation is surely an important method of social control. The council's authority to survey and allot reserve lands to the members becomes exerciseable only when such power has been requested to and granted by the Cabinet.[25] Where there has been no request or authority granted the allotment is made by the Minister and no transfer of allotted lands is valid unless approved by the Minister. Land transactions with non-members require the approval of Cabinet along with a surrender of the lands to the government.[26] A band may therefore be prevented by Cabinet from making industrial use of its land where the project requires a leasing to non-members.

Finally, although the power to regulate disorderly

conduct and nuisances is not specifically provided for under section 73, the operation, supervision and control of places of amusements is set out. Band council's jurisdiction over the observance of law and order may be eroded by Cabinet's exercise of the basket provision as this falls under the purpose of the Act. It appears that the social economic and physical conditions of the community as defined by the wishes of the band may not only be rendered ineffective by a subsequent regulation of Cabinet but also be prevented from ever arising should Cabinet decide to exercise most of its regulatory powers. The Act fails to provide any legal avenue for the Cabinet or the Minister to even reconsider its or his decision on issues which are crucial to the survival of a culture, of a way of life. The provisions with respect to the all important protection and preservation of fur-bearing animals, fish and other game on the reserve are no less subjected to regulations.[27] As to excluding undesireables from the reserve lands, the Minister has the authority to authorize any person to occupy or otherwise exercise a right over reserve lands for a period of one year without the consent of band council.

Having ascertained the subject-matters with which band council may legislate we now turn to its jurisdiction in terms of physical land mass and the people therein

affected by band council by-laws. Although the Act fails to expressly deal with the issue, it nevertheless provides some assistance.

It is submitted that by applying the cardinal rule of statutory interpretation, that is, by reading any relevant provisions in their context, band council's territorial jurisdiction becomes limited to the reserve boundaries. The fact that many of the headings under section 81 specifically refer to the reserve and the similarity between the structure and powers of band and municipal councils tend to support this view. Further, it is difficult to perceive the object and intent of the Act as requiring that the jurisdiction of band council extend beyond the reserve itself. Perhaps a more interesting question, however, is whether band council's territorial jurisdiction encompasses lands surrendered by lease. A recent British Columbia Court of Appeal decision states that Parliament retains its exclusive legislative jurisdiction over such lands.[28] As a corollary to that decision it would appear that band council could pass a by-law affecting lessees of such lands. The writer suggests that the scope of this jurisdiction will depend first on the extent to which the by-law affects the use which is permitted by the surrender and secondly, in some cases whether the lessee is an Indian.

Where the effect of the by-law is to prohibit the use for which lands have been surrendered and where it can also be shown that the by-law was directed to or intended to affect the lessee(s) in question, the by-law is void on the grounds that it was passed in bad faith. Admittedly the issue is not without complications since the legislative act is done in good faith when passed pursuant to the public (the band's) benefit and the courts have, to a certain extent, recognized municipal councils as being in the best position to ascertain what is in the best interests of the public. Alternatively the court might refer to section 41 of the Act whereby a band is deemed to give up all such rights as are necessary for the government to carry out the terms of the surrender as including the giving of the right to pass by-laws which would prevent a lessee from enjoying the full rights granted by the terms of the surrender. If such an interpretation were made, bad faith becomes irrelevant and any by- law which effectively diminishes or eliminates the otherwise permitted use would be inapplicable to surrendered lands. Given that a by-law does not affect the use for which surrendered lands have been based it may nevertheless be inapplicable to the lessee. That will depend on the more general and most important issue of this area, viz: whether band council has

jurisdiction over non-Indians. It may well be that for purposes of self-determination a band will want to invite non-natives and perhaps even lease part of its lands so long as it can maintain some control over these people through its by-laws.

The British North America Act gives to Parliament under section 91 (24) jurisdiction over "Indians and Lands Reserved for Indians". It is apparent that there is no legislative jurisdiction over non-natives except to the extent that they make use of reserve lands. This same limitation applies to band council's jurisdiction, though it is submitted that no further restrictions with respect to the applicability of by-laws to non-natives can be found in Parliament's delegation of legislative authority to the band council. In the opinion of the writer, therefore, band council's jurisdiction extends to non-Indians at least in their use of reserve lands. However one might also take the view that insofar as the application of a band by-law to non-natives is necessarily incidental to legislating with respect to Indians such application may be constitutionally valid.

There appears to be some judicial authority, however, to the effect that band council's jurisdiction is limited to Indians on reserve lands. In R. v. Superior Concrete Ltd.,[29] Swencisky Co. Ct. J. convicted a tenant

of surrendered reserve lands for breaking a municipal by-law. It was put to the judge that this noise by-law encroached on band council's jurisdiction over the "prevention of disorderly conduct and nuisances."[30] The trial judge denied the encroachment, reasoning that the municipal by-law did not purport to deal with "Indians on reserve lands ... a field exclusively reserved to the council of an Indian Band."[31] No legal reasoning or justification may be gleaned from the judgement which would support such limitation to the council's jurisdiction.

What are the effects of the limitation of band council's jurisdiction over non-Indians? The most obvious is the loss of control over these people, since many social regulations are not directed to the use of land. Perhaps not as obvious, but definetely as important, is the intrusion of provincial laws on the reserve as applicable to non-natives. The British Columbia Court of Appeal ruled that a municipal or provincial enacment encroaches on Parliament's jurisdiction when it is directed to the use of land.[32] For example, whereas a zoning by-law and health regulations with respect to recreation facilities are directed the use of land a noise by-law is not so directed since one need not necessarily make use of land in order to breach the by-law. Further, the by-law is no more of an encroachment

merely because a person may be enjoined from making use of that property as constitutes a breach of the by-law.[33] The effects of such laws can be very serious. In R. v. Superior Concrete Ltd.[34] the lessee had to cease its operations with the result that quite a few members of the band lost their employment with that company. In R. v. Samartino,[35] the court approved provincial legislation which imposed a personal tax on the occupier of inter alia, surrendered lands. A band may well see potential lessees bargaining to pay less rent in view of their provincial tax obligations, and needless to say, the tax revenues would not find their way into band funds.

It is submitted that section 88 of the Indian Act does not affect band council's jurisdiction either over Indians or non-Indians. That section only deals with the applicability of provincial laws to Indians, and only in so far as the subject-matter of those laws is not already provided for in the Indian Act. It is not yet decided whether the band council must pass a by-law with respect to the matter dealt with in the provincial legislation in order to prevent the application of such legislation to the Indians on the reserve. The writer assumes that section 88 does not make of reserves enclaves of provincial legislation as it applies to Indians.

The subject-matters, territory and persons

susceptible to a band council's jurisdiction having been ascertained, attention is now drawn to the enforcement of the legislative acts of that body. A violation of a by-law is punishable by a maximum fine of one hundred dollars and/or imprisonment of up to thirty days.[36] There can be no doubt however, that in the legal system within which the bands must operate, the realistic enforcement of laws lies in the powers of arrest.[37] Although the maximum penalties are admittedly minimal, the reporting and bringing of persons to a court of competent jurisdiction may nevertheless constitute an effective method of controlling continuing and future infractions. It is submitted that the council's jurisdiction over the observance of law and order and any matter ancillary thereto[38] allows a band to either create its own police force, contract out the enforcement of its by-laws, or implement a combination of the two by having the "contracted" police apply physical force, such as arrest when necessary. Two interrelated problems become evident. Although the identification and reporting of an infraction may require little expertise, the bringing and prosecution of a person before a court are matters most effectively carried out by the experienced. The resulting farming out of the latter operations is problematical since the contracting enforcement agency

could refuse either to enforce certain by-laws or to follow certain band council regulations in the carrying out of such tasks. As an alternative solution, the band, in pursuance of its self-determination, could embark upon a training program of its own law enforcement officers. Both of the options require considerable expenditures. The access to moneys is not only crucial with respect to the enforcement of by-laws but also with respect to the band's capacity to carry out projects and programs which it considers most appropriate to its environment and culture.

Although the analysis of that level of economic development permitted by the Indian Act does not come within the ambit of this paper, the writer nevertheless deems it necessary to assess and emphasize the band's control over both available monetary sources and the management of reserve lands.

The Act divides Indian moneys into capital, such as money derived from the sale of surrendered lands or the sale of capital assets, and revenues, that is money other than capital moneys.[39] Capital moneys are strictly controlled since the council must consent to the Minister's expenditure of such moneys for any purpose other than the compensation for expropriation of an Indian's interest in lands and rectification of emergencies to

reserve property.[40] Capital may also be spent, inter alia, on the construction and maintenance of roads, and bridges, the construction of houses, and for any other purpose that in the opinion of the Minister is for the benefit of the band.[41] This scheme, requiring both Ministerial authorization and band council consent, results in a shared veto power over capital expenditures.

Council's veto over the expenditure of revenue moneys depends upon the construction placed on section 66, for unlike the section dealing with capital moneys, it is divided into three subsections, the last two of which make no reference to band council's consent.[42] The first subsection requires such consent for the expenditure of revenue moneys for any purpose which, in the opinion of the Minister, will promote the general progress and welfare of the band whereas the second and third subsections enable the Minister to authorize expenditures for such purposes as to assist the sick and disabled Indians, provide for burial grounds, for the prevention, mitigation and control of the spread of diseases. It is the writer's opinion that in view of the seriousness of the situations listed in the second subsection and more importantly, in view of the fact that every purpose set out in the third subsection is also within the Governor in Council's jurisdiction under section 73 a court of

law is likely to find that these subsections ought to be read in and of themselves and not as examples of purposes which may, in the opinion of the Minister, promote the general progress and welfare of the band. The council's consent would, therefore, not be a requirement to the minister's expenditure of revenue moneys under those two subsections. It appears from the foregoing that the council exercises less control over revenue than over capital moneys yet the Act provides that the "Governor-in-Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order."[43]

A permission under that section carries with it a substantial enhancement to a band's self-determination since it allows the band to expend revenue funds without Ministerial authorization, otherwise required by section 66. It is important to note however that unless the permission extends to the whole of the revenue moneys, the Minister may expend such moneys under the second and third subsections without consent and under the first subsection of section 66 with consent of the council.

At least one limitation on the band's control over revenue moneys, as permitted by the Cabinet, may be found, ironically, in the band's power to pass money by-laws.[44] The enabling section provides that no

expenditure out of moneys raised either by the assessment and taxation of interests in land or by the licensing of businesses, shall be made except under the authority of a by-law of the council of a band, such by-law being subject to the approval of the Minister. The general provision in section 69, with respect to the control and expenditure of revenue moneys cannot derogate from the explicit provision dealing with the expenditure of those revenue moneys raised in the manner set out above. It is therefore beyond Cabinet's jurisdiction to waive the requirement of Ministerial approval on the expenditure of moneys raised by assessment or licensing.

Briefly then, council shares a veto power over the expenditure of capital moneys, for the most part, and over revenue moneys at least to the extent that the expenditure is not within the categories set out in subsections two and three of section 66. Cabinet's permission to control and expend revenue moneys overrides the provisions in section 66. Finally, a by-law with Ministerial approval is always required for the expenditure of moneys raised by assessment or licensing.

If the council is seen as the primary tool for the furtherance of a band's right to determine its way of life, the extent to which it controls the use of reserve lands is surely just as critical as its control

over monetary sources. Its power to pass by-laws in relation to land use has previously be discussed.[45] The Act deals with the management of reserve lands dividing them into three components: lands occupied by the band, unused or uncultivated lands and surrendered lands.

The band may request Cabinet to grant to it "the right to exercise such control and management over lands in the reserve occupied by that band as the Govenor-in-Council considers advisable."[46] Assuming that lands occupied by the band do not include surrendered lands, the territory in question nevertheless remains ambiguous. Does the Act use the word "occupied" as a legal term of art, ie: that only lands actually occupied by either the band as an entity or by its members fall within the section? It is the writer's opinion that the Act more than likely means all reserve lands which have been allocated to a band - a situation which is only relevant where more than one band shares a reserve. It would therefore include lands which have not, as of the date of the request, been alloted to individual band members by the Minister. There are no apparent limitations to the extent of control which may be granted by the Cabinet.

Unused or uncultivated reserve lands may be leased for agricultural or grazing purposes when authorized by the Minister with the consent of the band.[47] Such leasing

necessitates a surrender, approved by the band, unless it is done at the request of the person in lawful possession of that land.[48] Where the Minister improves or cultivates the land, as opposed to leasing it for such purposes a surrender is also necessary.[49] Similarly the Minister is not to authorize the removal of sand, gravel, clay or other non-metallic substances, nor the cutting of timber without the consent of band council.[50] It is submitted that the Minister's power to authorize such dealings with reserve lands is only affected by the Cabinet's grant of control to the band to the extent that the Minister loses his veto. That is to say, council could engage in the above transactions without approval or authorization of the Minister.

There can be little doubt that the power to manage, sell, lease or otherwise dispose of surrendered lands is appealing to any band following the path of self-determination. The Act places this power in the Minister or any person appointed by him for such purpose.[51] Does a band or its council qualify, or more to the point, is the band considered a person in law? Clearly, the status of a band affects the nature and extent of its capacity to engage in almost any activity, both with its own members and outsiders. The following discussion deals with the status of a band, its effect on civil litigation in

general, and on contract and tort more specifically, as well as its effects on activities other than litigation.

In the case of Mintuck v. Valley River Band, Solomon J. held that a band had a character distinct from its members, that it was a legal entity, but that it was not a body corporate capable of being sued under the rules of the Manitoba Court of Queen's Bench.[52] As a result the judge made a representation order which had the effect of making the chief and the councillors representatives of the band. Judgement was given as against the individual named representatives and all members of the band other than the plaintiff, with the right of execution limited to the assets of the band.[53] The test as to "legal entity" was whether the band was a closely knit group working for the benefit of its members, a group which also has assets capable of being applied to the satisfaction of the obligation incurred.[54] The court of appeal unanimously approved the representation order although Guy J.A. did so on other grounds. In relying on the decision of the Supreme Court of Canada[55] Guy J.A. stated that the band could sue and be sued through its councillors (or agents) since they had the right to act as agents for the other members and to contract on their behalf. It is clear that with respect to its contracts entered into by the council and in accordance with the

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provisions of the Indian Act a band is capable of suing and being sued.

The extent to which a council can bind the band with respect to tortious conduct remains nebulous. In the Mintuck case,[56] the plaintiff had leased reserve lands for agricultural purposes but individual band members began to harass and threaten him to prevent him from making any use of the lands. A good while after the harassment commenced, band council sent a letter to the plaintiff requiring him to make agricultural use of the lands in question and later not only purported to revoke the surrender but actually took possession of the lands. O'Sullivan J.A. took the position that the band was liable for trespass, the tort of intimidation and unlawful interference of the economic interests of the plaintiff as of the day the band took possession of the lands.[57] Matas J.A. expressly, and Guy J.A. implicitly, found that the band was liable as of the day of the first harassements since the acts of those individuals were adopted by the council (and therefore by the band) when the council sent its admittedly legally ineffective revocation and when council resolved to take possession of the lands and when council refused to meet with Mintuck.[58] The point is that Matas J.A. imposed liability on the band through the council's adoption of the prior

tortious acts of a few members rather than through the council's tortious acts in and of themselves even though the plaintiff had dropped his claim for damages prior to the date of actual occupation by the band. Following, Matas J.A.'s approach a band could be liable for tortious acts of it's members which have been ratified by council.

Given that the band's status does not substantially affect its capacity to partake in legal proceedings to what extent will its lack of corporate status prevent it from participating in other activities?

The Federal Court of Appeal in a very recent decision[59] unanimously held, without reasons, that a band is an employer for the purposes of the Unemployment Insurance Act whereas Philp Co. Ct. J. in R. v. Cochrane held that a band could not be an employee under the Canada Post Office Act.[60] In the latter case the accused, who was an employee of the band, was charged with converting public moneys to her own use contrary to section 65 of the Post Office Act. She defended by asserting that she was not a postal employee, a term defined in the Post Office Act as: "a person employed in any business of the Canada Post Office, but does not include a mail contractor or the employee of the mail contractor." Since it was clear that the accused was employed in "any" business of the Canada Post Office the remaining issue was whether

the accused could be said to be an employee of a mail contractor, yet the judge found it necessary to determine whether the band could be a postmaster. He then reasoned that it could not, because a postmaster is an employee which under the Post Office Act must be a legal or natural person and a band enjoys neither one of these statuses. It is submitted that this exercise was obiter since the judge went on to deal with the only relevant issue and found that on the facts the band was a mail contractor under the Post Office Act. The decision with respect to the band's incapacity to be a postmaster is not only obiter but also appears to contradict the judge's enunciated reasoning. He states that the issue before him is not to determine the nature and extent of the powers of a band[61] and yet his resolution of the issue precludes the band from carrying on the duties of a postmaster. Surely that affects the powers of a band! Philp Co. Ct. J.'s position is perhaps best explained and indeed consonnant with previous authorities when viewed in the following light.

The status of a band, viz: being neither a legal nor a natural person, does not affect the nature and extent of its powers with respect to civil proceedings since the band, as a recognized legal entity, may sue or be sued by representative action. However, its

status will prevent it from engaging in any activity which, in law, may be exclusively carried on by natural persons or corporations. It is the writer's opinion that such a distinction is a valid one. Since the Federal Court of Appeal failed to explicitly support its position that a band is capable, in law, of being an employer[62] one can assume only that either the Federal Court regards invalid the distinction between the capacity to participate in legal proceedings with that of engaging in other activities or that the court is of the opinion that one need be neither a natural nor a legal person to be an employer under the Unemployment Insurance Act. Finally, the analysis with respect to status prevents a band from being appointed by the Minister for the management of reserve lands. This legal nicety has apparently been overcome by appointing a trustee, ie: a natural person, to the use and for the benefit of the band.

As indicated in the introduction, the writer has chosen to divide the paper into those factors which are obviously not conducive to the self-determination of a band and these factors which though not apparent are nevertheless inherently detrimental to the emancipation of natives. We have seen that the choice of a form of government most apt to the culture and demography of a band does not exist. The erosion of band council's

jurisdiction by Cabinet regulations not only destroys initiative where the regulations are passed prior to a band's attempt at exercising its powers but could also discourage a band who has already passed its own by-laws. Further, it has been seen that unless band council's jurisdiction over non-natives is necessarily incidental to the proper regulation of Indians or directed to lands reserved for Indians, the use of non-natives in the development of a band may be seriously hampered. There are also serious problems with the enforcement of by-laws especially where funds are not readily available for the training of personnel. The Minister's veto power over band by-laws, expenditures of band moneys and the use of reserve lands removes any semblance of an opportunity for self-determination in these crucial matters unless the Governor-in-Council grants certain powers. Finally, it was seen that the lack of corporate status seriously limits the scope of activities which a band has the legal capacity to undertake.

It is an imbedded principle of natural justice that justice must not only be done but must also be seen to be done. It is only natural that a person will be reluctant to pursue his or her activities through a medium which gives the impression of dealing unfairly. A band council which loses its control over lands under section 60,

a band council who finds its project refused, without reasons and without an opportunity to either present its case or meet an opposing one, is not a band council which is encouraged to advance new proposals. In short, the lack of natural justice safeguards is anything but conducive to self-determination. Given a council's belief that it has been dealt with unfairly, what recourse or remedy can it expect from a court of law? The answer to this question will be treated in a general form so that the analysis will hopefully lend itself to provisions not specifically dealt with. The emphasis being placed on that administration of the Act most conducive to the self-determination of a band, the following issues shall be raised: whether the Minister is under a duty to consider a proposal, to act judicially when he does consider a proposal, to give reasons for his decisions, as well as the result when the Minister bases his decision on irrelevancies.

Is the Minister under a duty to consider a given proposal? It is submitted that wording to the effect that "the Minister may authorize with the consent of the council of the band" does not of itself lend to an interpretation of a clear legal duty on the Minister to consider a proposal by band council with respect to what it is the Minister is given discretion to authorize.

Furthermore, there is no express provision which gives to the council any opportunity to present proposals with respect to the use of capital moneys, or the use of uncultivated or unused lands, or the use of lands for any purpose for the general welfare of the band. It is therefore doubtful that a duty to consider such proposals would be imposed on the Minister. The fact that band council is given specific jurisdiction to pass money by-laws and that these by-laws are subject to the approval of the Minister suffices to support an argument that the latter must at least consider the by-law.[63] The principle of administrative law that an administrative body cannot fetter its discretion on policy grounds prevents the Minister from refusing to deal with the matter. Although he may lay down general policy guidelines he must nevertheless consider the merits of each by-law and be prepared to admit of exceptions in appropriate circumstances.[64] What is most important to the band, however, is the compelling of the exercise of the Minister's duty to at least consider the money by-law.

The band could seek mandamus against the Minister even though he is Crown servant, for the courts have, as of late, taken the view that the duty is imposed on the Minister personally rather than as a servant of the Crown; "it (the court) is acting under the Crown, to

compel respect to the Crown by ordering that the Crown's commands be obeyed by the Crown's servants. The Crown has deposited in the Courts its faculties in that respect."[65] However, there remains two problems. The British Columbia Court of Appeal held that for an order of mandamus to issue the officer against whom it is sought must be charged with a statutory duty by the express provisions of the statute.[66] The Supreme Court of Canada in a later decision, however, no mention that the duty be expressly stated.[67] Finally, the issue of status seems to be resolved in favour of band members since the decision of the Federal Court, Trial Division in National Indian Brotherhood v. C.R.T.C.[68] It is submitted that if the National Indian Brotherhood has status ie: sufficient legal interest to contest a decision of the C.R.T.C. which refused to hold a public hearing on a film alleged to be slanderous to Indians, a band council surely has sufficient status to complain about a Minister's refusal to consider a money by-law. Since the Minister is under a legal duty to at least consider the by-law, ie: since he has no discretion as to whether or not he will consider it, a council may obtain an order of mandamus from the Federal Court Trial Division.

It is most appropriate to discuss the framework of the Federal Court at this juncture. The Court of

Appeal may review and set aside all decisions made on a judicial or quasi-judicial basis, other than those made by the Governor-in-Council.[69] That court has no other jurisdiction. The Trial Division may compel the exercise of a statutory duty and make declaratory judgements but not with respect to decisions falling under the jurisdiction of the Appeal Court.[70] This distribution of powers prevents the Courts from compelling any decision-maker to act in a judicial manner. The Court of Appeal can only review and set aside decisions which should but have not been made on a judicial basis. Given that the decision of the Governor-in-Council cannot be set aside on such grounds, is the Minister under a duty to act judicially?

The traditional view in Canada has been that a decision is not to be set aside for a breach of the rules of natural justice unless the decision affects rights and unless there is a super-added duty to act judicially. Recent decisions have somewhat blurred the two allegedly distinct requirements. The English Court of Appeal bases its finding on the seriousness of the right in question and on the effect of the decision on that right. The duty to act judicially is inferred from the right at stake.[71] Interestingly enough however the English Courts restrict their view of 'serious rights' to common-law rights such as

the right to trade and carry on an occupation. When the Minister's decision relates to the band's property or to its carrying on a business it appears that a band has a right upon which it can rely. The Supreme Court of Canada, however, rejected "the contention that the duty to act judicially arose whenever private rights were affected."[72] Ordinarily, the courts require the imposition of a statutory duty similar to the trappings of a court, such as notice or the giving of an opportunity to know and meet the opposing case, on the decision-maker before labelling the decision quasi-judicial.[73]

Perhaps the most notable recent development in administrative law is the recognition of rights and of the duty of a final decision-maker to act judicially where the scheme of the Act gives to the applicant notice or an opportunity to be heard at a prior influential stage of the decision- making process. This proposition is borne out by Martland J.'s statement in Calgary Power v. Copithorne adopted by the majority in Howarth v. The Queen viz: "In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not there is a duty to act judicially."[74] It is submitted that the statutory process by which the matter reaches the decision-maker

will, to a great extent, define the scope of or her functions, ie: how much of the deciding has already been done? For instance, the Federal Court of Appeal in Lazarov v. The Secretary of State recognized in the applicant a statutory right to make representations and answer allegations against his character, on the basis that such representations could be made to the Citizenship Court under the Canadian Citizenship Act.[75] Although the final decision was to be made by the Minister, he could not base such decision on reports detrimental to the applicant's character without first making available to the applicant the pertinent allegations raised against him and subsequently giving him a fair opportunity to dispute or explain them.[76]

It is submitted that the following approach ought to be taken when considering whether the Minister has a duty to act judicially on a given decision: does the Act require him to give notice or to give to the band or its council an opportunity to make submissions and to rebut an opposing case? If not, the duty must be implied from the statutory process through which the decision is made. An examination of the Act leads to drastic results. The Minister is under no express duty to inform band council of his to refuse any by-law. Further, although there may be a statutory process for the passing of a by-law it is submitted that there is no such process for the approval

of the by-law. No reports by any intervening body to which a council could make representations are to be considered by the Minister. In short , the Minister, at least under the present administrative law in Canada is not under a duty to act judicially. A Minister's or a Cabinet's decision would only be subjected to the jurisdiction of the Trial Division of the Federal Court. The most which could be obtained is a declaratory order accompanied by damages when the decision is made in bad faith. Such an order issues where a decision-maker bases his decision on a matter which is irrelevant to the issues or proposals before him.

Where an Act fails to set out specific considerations for the exercise of a descretionary power, the decision-maker must base his decision on the intention and object of the Act. Any other considerations are irrelevant. The Indian Act is of some assistance for it provides that reserve lands are held for the use and benefit of Indians and that, similarly, Indian moneys shall be expended only for the benefit of Indians.[77] This would appear to give much leeway to a reviewing court, however the Act goes on to specify that in both matters The Governor-in-Council may decide whether any given purpose to which such land and moneys may be put is for the use and benefit of a band. This, it cannot be denied, is a formidable

obstacle for any court facing a decision of Cabinet which refuses an application or revokes the granting of control over reserve lands, or revenue moneys. Whether a court could interfere in these situations depends on the Parliament's responsibilities under the British North America Act with respect to Indians. That is a matter well beyond the scope of this paper. Suffice it to say that even if the courts accept a trustee relationship the further issue is whether they would extend the doctrine to enforce a duty on government officials to act in the manner most beneficial to Indians. For instance, would it encompass a duty to act judicially, that is to give notice or an opportunity to the to present its and meet an opposing case, or even require the decision-maker to give reasons? These are all matters conducive to self-determination as they imply fair-play and provide a certain sense of security. Finally, it is submitted that an open judiciary could review the Minister's discretion with respect to the approval of by-laws dealing with lands or moneys, where Cabinet has not set policy guidelines for the exercise of that discretion. Similarly, the court could declare a Minister's decision ultra vires where it deems it not to conform to guidelines set by the Cabinet.

A brief recapitulation of the administrative law applicable to decisions made pursuant to the Indian Act

is appropriate at this point. The Minister is not under a duty to consider proposals with respect to matters which are dealt with by the Act in language to the effect that the Minister may authorize with the consent of band council. On the other hand, the Minister is compellable to at least consider a duely passed money by-law submitted to him. There is no duty on the Minister to act judicially when considering band council by-laws since , even though his decision might affect private rights such as land or money, a super-added duty could be inferred neither from the provisions giving him jurisdiction to make the decision nor from the process by which a decision is made. The result is that no notice, hearing or reasons need be given. It is also appropriate to note that the Governor- in-Council is neither subject to the Federal Court of Appeal's reviewal jurisdction nor to the trial division's mandamus jurisdiction. Finally, even if a Minister considers matters which may appear to a band as being irrelevant to its use and benefit the only recourse available is a declaration when the Minister has failed to comply with the guidelines set by the Cabinet, or if there no guidelines when the court disagrees with the Minister as to what is for the use and benefit of a band. Similarly, a court willing to apply the trust doctrine to the federal government would have to extend its inherent jurisdiction

of reviewing actions of a trustee to conceding that it is most beneficial to the beneficiary Indians that they be treated in a judicial manner.

We have seen that the Act's failure to provide a statutory process through which important matter relating to the government of bands leads to a very wide, apparently, absolute discretion either in the Minister or in Cabinet. In reality, however, such decision-makers base their decisions on information provided to them by a massive bureaucracy. The inevitable result is that the proposal of a band council is often not the proposal presented to the "final" decision-makers. Perhaps the latter could make known to the bands any policy directives which they have in mind in order to facilitate communications and approval of proposals. Considering the size of Canada and the diversity of native groups within it, wide ranging policies may be detrimental to an individual band. The writer suggests some form of decentralization which ultimately would become a real self-government at the band level with full economic and technological resources available. The problem with a gradual decentralization is the delegation of powers to regional directors who, although presumably more aware of the issues most important to the natives in their respective regions, are nevertheless not ultimately responsible to the legislature.

In the final analysis, it seems that in conformity with true principles of self-determination it is the band itself, perhaps through its council, which must decide on those subject-matters or areas of life it wishes to govern and those which it wishes to leave to an exterior agency. The transition must proceed through the will of the band members. It appears that the bands ought to be given the widest choice possible as to the level of self-government they wish to undertake. On the basis of the reasoning and the findings made in this paper, the writer suggests, in conclusion, that the following alternatives be presented to the native bands presently under the Indian Act.

The band ought to be given the right to choose that structure of government which it deems to be most apt to its cultural and demographic parameters. The legislative jurisdiction of the chosen government could include everything presently permitted without direct invasion of such fields by Cabinet regulations and might also extend to education, rights over property, and civil relationships such as marriage and adoption. Further, the option to make by-laws applicable to non-Indians should be granted by recognizing such application as necessarily incidental to the proper regulation of Indians and lands reserved for Indians. The power to

impose greater fines and sentences along with the availibility of funds for the training of personnel to enforce and prosecute for the breach of by-laws could go a long way in providing a more meaningful band government. The status of the band may have to be altered in order to permit it to engage in activities which can only be carried on by persons or corporations. Perhaps the most important area with respect to self-determination is the power or control over monetary funds and the uses to be made of reserve lands. Ultimately such control must rest with the band but, at least for a transition period, either the Minister or a regional director might hold a veto over such matters in order to avoid a serios loss due to inexperience. In such cases, policy guidelines ought to be set, notice given, hearings and reasons provided, so that a full and effectual communication of the band members' true wishes are made known. Further these natural justice safeguards ought to be statutorily implemented in order to make the decisions subject to review and being set aside by the Federal Court of Appeal. This would increase the decision-maker's tendency to deal fairly with the band thereby creating an atmosphere of security conducive to a burgeonning self-determination.

FOOTNOTES

[1] Indian Act. R.S.C. 1970, c. I-6, s. 74.

[2] Id. s.78(2).

[3] Id. s. 74(4).

[4] Id. s. 79

[5] Id. s. 76(4).

[6] Isaacs v. Davey et al. (1974), 51 D.L.R. 170 (C.C.A.).

[7] George Erasmus, Dene Nation, The Colony Within, Mel Watkins ed., University of Toronto Press, Toronto, p. 180 : " .. the form and procedure (of Territorial Council) is foreign to our own values and decision-making process... the structure dictates the evolution of elitist decision-making."

[8] R.S.C. 1970, c. I-6, s. 81 (1) (g).

[9] Id. s. 81(1) (h).

[10] Id. s. 81(1) (b).

[11] Id. s. 81 (1) (f), (l).

[12] Id. s. 60 (1).

[13] Id. s. 81 (1) (d).

[14] Id. s. 81 (1) (m).

[15] Id. s. 81 (1) (c).

[16] Id. s. 81 (1) (o).

[17] Id. s. 81 (1) (n).

[18] Id. s. 73 (1) (f) , (g), (h).

[19] Id. s. 73 (1) (k).

[20]Id. s. 18 (2).

[21]Id. s. 73 (1) (i).

[22]Id. s. 73 (1) (l).

[23]Id. s. 19.

[24]Id. s. 34.

[25]Id. s. 60.

[26]Id. s. 39.

[27]Id. s. 73 (1) (a).

[28]Surrey v. Peace Arch (1970), 74 W.W.R. 380.

[29]unreported in Saunders, Cases and Materials on Native Law, (3rd ed.), 308.

[30]Id. at 309.

[31]Id. at 310.

[32]see footnote 28, infra.

[33]see footnote 29, infra.

[34]see footnotes 28 and 29, infra.

[35] 1972 1 W.W.R. 74 (B.C.C.A.).

[36]R.S.C.1970, c. I-6, s. 81 (1) (n).

[37]It is nevertheless that a band may possess methods other than imprisonment or the imposition of fines to bring its members within accepted social conduct.

[38]R.S.C. 1970, c. I-6, s. 81 (1) (c), (q).

[39]Id. s. 62.

[40]Id. s. 65.

[41]Id. s. 64.

[65] Lee v. Workmen's Compensation Board, 1942 2 D.L.R. 665 at 682.

[66] Id. at 684.

[67] R. v. Leong Ba Chai, 1954 S.C.R. 10.

[68] [illegible]

[69] Federal Court Act, S. C. 1970-71-72, c. 1, s. 28.

[70] Id. s. 18.

[72] Howarth v. National Parole Board (1974), 50 D.L.R. (3d) 349 (S.C.C.).

[73] Calgary Power Ltd. v. Copithorne, 1959 S.C.R. 24.

[74] Id. at 30.

[75] (1974), 39 D.L.R. (3d) 738, 749 (F.C.A.).

[76] Id. at 750.

[77] R.S.C. 1970, c. I-6, ss. 18 and 61.

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